2006

The State of Utah v. Roy Drake Irvin : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
ROY DRAKE IRVIN,	:	Case No. 20060638-CA
Defendant/Appellant.	:	Appellant is incarcerated.

BRIEF OF APPELLANT

Appeal from a judgment of conviction for two counts of Aggravated Robbery, a first degree felony, in violation of Utah Code Ann. § 76-6-302 (2003), and one count of Failure to Respond to an Officer's Signal to Stop, a third degree felony, in violation of Utah Code Ann. § 41-6a-210 (2005), in the Third Judicial District, in and for Salt Lake County, State of Utah, the Honorable Timothy R. Hanson, presiding.

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JURISDICTIONAL STATEMENT

This is an appeal from a judgment of conviction for two counts of Aggravated Robbery, a first degree felony, in violation of Utah Code Ann. § 76-6-302 (2003), and one count of Failure to Respond to an Officer's Signal to Stop, a third degree felony, in violation of Utah Code Ann. § 41-6a-210 (2005), in the Third Judicial District, in and for Salt Lake County, State of Utah, the Honorable Timothy R. Hanson, presiding. Jurisdiction is conferred upon this Court pursuant to Utah Code Ann. § 78-2a-3(2)(j) (2002). See Addendum A (Judgment and Conviction).

ISSUE AND STANDARD OF REVIEW

Issue 1: Whether the trial court abused its discretion by denying Irvin's motion to dismiss one of the aggravated robbery charges where the two counts merged and constituted a single offense under the law.

Standard of Review: "Merger issues present questions of law," which this Court will "review for correctness." State v. Diaz, 2002 UT App 288,¶10, 55 P.3d 1131; see State v. Lee, 2006 UT 5,¶26, 128 P.3d 1179; State v. Fedorowicz, 2002 UT 67,¶59, 52 P.3d 1194.

Preservation: This issue is preserved at R. 292-302 (motion and memorandum supporting motion to vacate); 367:57 (motion to vacate raised following jury verdict); 368 (motion hearing); see State v. Wareman, 2006 UT App 327,¶28, 143 P.3d 302 ("A defendant can preserve a merger issue in the trial court by objecting 'either during trial, or following the conviction on a motion to vacate.'" (citation omitted)).

Issue 2: Whether Irvin's private counsel provided ineffective assistance when he failed to object to the trial court's imposition of enhancements for use of a dangerous weapon, which resulted in Irvin being punished multiple times for the single act of carrying a dangerous weapon; and when he failed to object to the State's improper admission of anecdotal statistical evidence.

Standard of Review: Where an ineffective assistance claim is "first raised on direct appeal," this Court will review it "as a matter of law." State v. Snyder, 860 P.2d 351, 354 (Utah Ct. App. 1993); see State v. Maestas, 1999 UT 32,¶20, 984 P.2d 376.

Preservation: Ineffective assistance of counsel is an "exception[] to the preservation rule." State v. Cram, 2002 UT 37,¶4, 46 P.3d 230.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following constitutional provisions, statutes, and rules are determinative of the issues on appeal. Their text is provided in full in Addendum B.

United States Constitution Amendment V – Double Jeopardy;

Utah Constitution Article I, Section 12 – Double Jeopardy;

Utah Code Ann. § 76-1-401 (2003) – Single Criminal Episode;

Utah Code Ann. § 76-1-402 (2003) – Separate Offenses;

Utah Code Ann. § 76-6-301 (Supp. 2005) – Robbery;

Utah Code Ann. § 76-6-302 (2003) – Aggravated Robbery;

Utah Code Ann. § 76-3-203.8 (Supp. 2005) – Dangerous Weapon Enhancement;

Utah Rule of Evidence 403 – Exclusion of Relevant Evidence.

STATEMENT OF CASE

Irvin was originally charged by information with one count of Aggravated Robbery, a first degree felony, and one count of Failure to Respond to an Officer's Signal to Stop, a third degree felony. R. 2-4. On July 12, 2005, the Salt Lake Legal Defender Association (LDA) was appointed to represent Irvin. R. 13. On September 20, 2005, the day of the preliminary hearing, the State filed an amended information. R. 28; 29A-C. Along with failure to respond to an officer's signal to stop, the amended information now charged Irvin with two counts of aggravated robbery. R. 29A-C. Following the preliminary hearing, the trial court bound Irvin over on all charges. R. 28-29; 363.

On October 7, 2005, LDA filed a Motion to Suppress the Eyewitness Identification. R. 40-53. On November 14, 2005, the trial court granted LDA's motion, suppressing "any prior identifications of the defendant by alleged victim Teresa Celis," and "any in-court identification of the defendant by alleged victim Teresa Celis during the trial," but permitting "testimony from alleged victim Teresa Celis regarding any

description of the suspect during the incident." R. 73; 154-55; 157-58. On the first day of trial, December 6, 2005, LDA appeared with Irvin and moved for a mistrial after Celis pointed at Irvin during her testimony. R. 159-60; 365. The trial court granted LDA's motion. Id. On January 13, 2006, private counsel appeared on Irvin's behalf and LDA withdrew from the case. R. 171; 173-74.

On the first day of trial, March 28, 2006, Irvin moved to discharge private counsel and have LDA reappointed because private counsel was unprepared to try his case. R. 207-08; 366:6-9. In response to the trial court's inquiry, private counsel indicated he was "prepared to try this case." R. 366:9-11. The trial court denied Irvin's motion, holding, "Your request is out of time, and there's no basis for it. You haven't told me one thing that suggests that [private counsel] is not prepared the same way he was prepared the last time to go to trial." R. 207-08; 366:9-12. Although he did not want private counsel "to say one word on [his] behalf," Irvin agreed to "go along with" the trial court's ruling, and the trial proceeded as scheduled. R. 207-08; 366:11-12.

During his opening statement, private counsel explained to the jury why Irvin fled when the officer tried to stop him. R. 366:92. Irvin did not flee because he was guilty of the robbery; he fled because he panicked. Id. "Mr. Irvin had a warrant out of Louisiana. He had written a bad check back home and knew that there was an outstanding warrant. He's here trying to get things going, get his life back together, and that's going to potentially cost him his job and potentially send him back, where here he's been making good progress." Id.

At the close of the State's case, the trial court denied private counsel's motion to

dismiss the aggravated robbery charges for insufficient evidence. R. 286; 367:24-27. Private counsel presented no evidence in Irvin's defense. R. 286; 367:27, 31. Neither party objected to the jury instructions. R. 287; 367:28-29.

The trial court instructed the jury that:

> [R]obbery is the unlawful and intentional taking of personal property in the possession of another from his person, or immediate presence, against his will, accomplished by means of force or fear. A person commits aggravated robbery if in the course of committing robbery, that person uses or threatens to use a dangerous weapon; or causes serious bodily injury upon another.

R. 268; see Addendum C. It then instructed the jury that it could find Irvin guilty of the first count of aggravated robbery if it found:

> 1. That on or about the 3rd day of July, 2005, in Salt Lake County, State of Utah, the defendant, Roy Drake Irvin, took personal property then in the possession of Fast Track Convenience Store, from the person or immediate presence of Fast Track Convenience Store; and
>
> 2. That such taking was unlawful;
>
> 3. That such taking was intentional;
>
> 4. That such taking was against the will of Fast Track Convenience Store;
>
> 5. That such taking was accomplished by means of force or fear; and
>
> 6. That in the course of committing such taking, a dangerous weapon was used.

R. 269; see Addendum C. And the jury could find Irvin guilty of the second count of aggravated robbery if it found:

> 1. That on or about the 3rd day of July, 2005, in Salt Lake County, State of Utah, the defendant, Roy Drake Irvin, took personal property then in the possession of Teresa Celis, from the person or immediate presence of Teresa Celis; and
>
> 2. That such taking was unlawful;
>
> 3. That such taking was intentional;
>
> 4. That such taking was against the will of Teresa Celis;
>
> 5. That such taking was accomplished by means of force or fear; and
>
> 6. That in the course of committing such taking, a dangerous weapon was used.

R. 270; see Addendum C.

During closing argument, the State argued, "As far as fleeing, I think it was admitted in evidence that he did flee. He said he had warrants. It was true in this case, but it's a convenient excuse. You heard the officer testify they all say they have warrants, that's why he ran. I think he ran for another reason, because he was in a stolen car, because he had taken it earlier that night." R. 367:35. During closing argument for the defense, private counsel stated:

> [Y]ou know [the prosecutor] has stated that, well, they all say they have warrants, so that's not a valid reason. I don't know if that's true or not, but in this case there was a warrant. [Irvin] did have a warrant, and that's why he ran. He panicked. You know, I don't know what happened in other cases, but we know what happened in this case, he had a warrant. He had a warrant that he knew about.

R. 367:36-37. Following deliberations, the jury found Irvin guilty as charged. R. 283-85; 367:54-55. After the jury was excused, private counsel moved "to merge Counts 1 and 2." R. 267:56-57. The trial court allowed time for the parties to prepare briefs on the

motion. R. 367:57.

On April 10, 2006, private counsel filed a Motion to Vacate Conviction for Aggravated Robbery, arguing the two aggravated robbery charges were "properly subject to merger pursuant to Utah Code Annotated § 76-1-402 and Utah case law." R. 292. In the accompanying memorandum, private counsel explained, "The acts for which [Irvin] was convicted were part of a single criminal episode. The events were closely connected in time and were executed with a single criminal purpose and therefore represent a single criminal act." R. 301. "In addition, case law which is analogous to this case supports the conclusion that the Aggravated Robbery statute provides alternate means of proving that an aggravated robbery has occurred. The Aggravated Robbery statute allows enhancement of the Robbery statute for sentencing purposes, but each enhancing factor does not create a new crime." R. 301.

The State responded to Irvin's motion on May 9, 2006. R. 305. A motion hearing was held on May 11, 2006. R. 313; 368. In response to the trial court's question, private counsel explained that it did not "make any difference" whether there was one victim or two because "it's still a single criminal episode, single criminal objective close in time." R. 368:6. Private counsel continued, "[T]here is only one robbery that occurs in this case." R. 368:7. "[T]o find otherwise would put us in a position that any robbery where someone takes a vehicle and uses a dangerous weapon to accomplish that taking is automatically converted into two aggravated robberies. Or in a case where property is taken, a dangerous weapon is used and a serious physical injury is inflicted, that would also be, under the theory that the State puts forward, two counts of aggravated robbery."

Id. Following argument, the trial court denied private counsel's motion because "once the initial crime," "the robbery—taking the money by force and fear—is completed and then there's a second type of property taken from—in this case, this is her personal property that's being taken . . . through force or fear, you've got a second crime." R. 368:25-26; see Addendum D. The trial court then noted the issue was an "interesting" one and "perhaps it ought to be visited in the appellate courts." R. 368:26.

On June 9, 2006, the trial court issued findings of fact and conclusions of law. R. 318-20; see Addendum E. The trial court concluded "[t]aking the money from the store cash register completed the first, separate offense of Aggravated Robbery." R. 319. "The defendant began a second, separate offense of Aggravated Robbery when he took the victim's personal car keys, removed her to the back of the store, talked about tying her up, and told her to stay there. When he then took the victim's motor vehicle, the defendant completed the second, separate offense of Aggravated Robbery." Id.

Also on June 9, the trial court conducted sentencing proceedings. R. 315-17; 369. During the proceedings, the trial court gave private counsel "an opportunity to be heard on whether or not the year enhancement applies to this sentence, which would make this six to life as opposed to five to life." R. 369:10; see Addendum F. Private counsel said he had not "looked at that," but did not "believe there's any reason not to impose [the enhancements] at this point." R. 369:10-11. Imposing enhancements for each aggravated robbery charge, the trial court sentenced Irvin to two terms of six years to life and one term of zero to five years in prison. R. 315-16; 369:11-13. The trial court ran the sentences for the aggravated robbery charges concurrently and consecutively to the

failure to respond to an officer's signal to stop charge. R. 316; 369:13.

On July 3, 2006, private counsel filed a notice of appeal on Irvin's behalf and moved to withdraw as counsel. R. 324; 328. On July 11, 2006, the trial court appointed LDA to represent Irvin on appeal. R. 343.

STATEMENT OF FACTS

Teresa Celis testified she was working at Fast Track convenience store on July 3, 2005. R. 366:94-95. At around 7:00 pm, "an African-American gentleman came in." Id. at 95-96. He went to the ATM machine "and then he left." Id. at 102. A half hour later, "the same gentleman came in and went to the ATM." Id. The man put a "comdata card" in the ATM, said "My money is still not there," and left again. Id. at 102-04.

Twenty minutes later, the man returned again. R. 366:104-05. This time, after visiting the ATM machine, he "turned right around and walked up to the counter and asked [Celis] for a pack of Cool super long cigarettes and Cigarollas cigar." Id. at 105, 125. These items "were on the wall behind" Celis. Id. at 105-06. Celis "got the cigarettes" and "set them on the counter." Id. at 106. "Then he asked for the Cigarollas," which were "a little bit lower." Id. Celis "turned around" to retrieve the Cigarollas cigar and, "as [she] did that," the man came around the counter and stood "right in [her] face" with "a knife right in front of" her. Id. at 106-07, 125. The man ordered her to open the register and give him the money. Id. at 108-09, 128-29. After Celis gave the man the money, the man ordered her to give him her keys. Id. at 110. Celis' keys were in her purse, which was next to the cigarette case. Id. She gave him her keys. Id. at 110-11. Next, the man ordered her into the backroom. Id. at 111. In the backroom, the man

looked around for something to tie her up with. Id. at 112. Celis said, "Nobody is here. You got my keys. You got the money. You should just go." Id. at 112-13. The man ordered Celis to stay in the backroom. Id. at 113. Celis promised to stay for five minutes and the man left. Id. at 113, 131-32. After she heard the man leave, Celis called the police. Id. at 114, 132-33.

Celis described the man to the police as "an African-American male," "probably in his 30's," "5'8 and 170 pounds," and wearing "a gray T-shirt," "dark colored" "jogging, baggy-type pants," a "dark color" visor, and tennis shoes. R. 366:114-15, 134. Celis did not identify Irvin as the man who robbed the convenience store. Id. at 114-15. There was a surveillance system in the convenience store, but it did not record the incident. Id. at 115.

Officer Troy Anderson was on duty on the late evening of July 3. R. 366:142. At approximately 2:00 am on July 4, Officer Anderson spotted Celis' car, which had been reported as stolen. Id. at 143-45. Officer Anderson initiated a traffic stop. Id. at 145. Rather than stopping, Celis' vehicle accelerated. Id. at 146. A low-speed chase ensued, which ended when Celis' vehicle turned into a dead-end alley. Id. at 148-49. The vehicle stopped, and the "occupant jumped out" and "fled on foot." Id. at 150. Officer Anderson gave chase and caught the suspect. Id. at 150-51. Officer Anderson identified Irvin as the suspect. Id. at 151-52. At the time Officer Anderson apprehended Irvin, he was wearing a "white shirt," "dark" "sweat pants," and a dark visor. Id. at 152. Irvin had "over $300" in cash stuffed "in his sock." R. 366:154, 157.

Officer Anderson testified that "[t]ypically," people who flee from police say they

fled "because they thought they had warrants." R. 366:155; see Addendum G. "Probably 90 percent of the time if you ask, 'Why did you run?' They will say, 'Because I have warrants.'" Id. He based this conclusion on the "dozen, give or take" foot chases he had participated in during his career. Id. Private counsel did not object to this evidence. Id. Officer Anderson testified Irvin had a warrant out for his arrest when he fled. Id. at 158.

Detective Ralph Anderson investigated this case. At the police station, Detective Anderson saw Irvin. R. 366:165. Irvin was "wearing a white tank top, some navy cotton work pants, lo[o]se fitting, and . . . a tennis visor." Id. He described Irvin as "a male, black, adult," in his "mid 30's to mid 40's." Id. at 166. Irvin was carrying a comdata card and $447 in is wallet, his pants pocket and his sock. Id. at 168, 171, 181. The convenience store was missing $1,105. Id. at 181. Detective Anderson seized from the vehicle a pack of Cool 100s cigarettes and two bandanas. Id. at 174. No usable fingerprints were recovered from the investigation. Id. at 185, 190-92, 193-94, 197-201.

Officer David Kircher testified he was on duty on July 3, 2005, and assisted in the robbery investigation. R. 367:10-11. He ordered another officer to secure the convenience store and interviewed Celis. Id. at 11. He did not believe there were any good surfaces for lifting fingerprints. Id. at 12-16.

SUMMARY OF ARGUMENT

First, this Court should merge Irvin's convictions for aggravated robbery because charging Irvin twice for aggravated robbery violated the double jeopardy clauses of the United States and Utah Constitutions. In Utah, a single larcenous taking of property, whether owned by one or several individuals, will be treated as a single criminal offense.

Alternatively, when dealing with crimes against the person, a single criminal act will constitute as many offenses as there are victims of violence. In this case, regardless of whether this Court classifies aggravated robbery as a crime against property or a crime against the person, the result is the same. If it was a crime against property, the multiple ownership of the property taken is immaterial because there was only one intent and, therefore, one offense. Likewise, if it was a crime against the person, there was only one victim of an act of violence and, therefore, one offense, even though there were two victims of the larcenous act. Thus, this Court should reverse because the trial court erred by denying Irvin's motion to vacate one of the aggravated robbery charges.

Second, this Court should reverse because private counsel provided ineffective assistance when he failed to object to the trial court's decision to enhance Irvin's aggravated robbery charges. To demonstrate ineffective assistance, a defendant must first identify specific acts or omissions demonstrating that counsel's representation failed to meet an objective standard of reasonableness, and second show that but for counsel's deficient performance there is a reasonable probability that the outcome of the trial would have been different.

It is deficient performance if counsel fails to raise an argument because he merely overlooks it. This is true even if the issue counsel overlooked was an open question in our courts. In this case, the record shows private counsel did not forego an objection to the enhancements for any strategic reason. Moreover, private counsel was not excused from challenging the enhancements because less than a year before the sentencing proceedings in Irvin's case, our supreme court explained the double jeopardy

implications of applying the dangerous weapon enhancement statute to an aggravated robbery charge and invited defense attorneys to raise the issue. Thus, because imposing the enhancements in Irvin's case violated the double jeopardy clauses of both the United States and Utah constitutions, private counsel provided deficient performance by making no effort to prevent their imposition.

Specifically, enhancing the aggravated robbery charges violated the federal due process clause because the Utah Legislature, if it intended to doubly punish defendants for using a dangerous weapon, did not make this intent clear in the statute. Enhancing the aggravated robbery charges also violated the Utah double jeopardy clause because, like the Montana Constitution, the Utah Constitution prohibits the double punishment of a single offense, regardless of the Legislature's intent. Further, even if the United States and Utah constitutions allow the dangerous weapon enhancement to be applied to an aggravated robbery charge, the double jeopardy clauses were still violated in this case because both aggravated robbery charges were enhanced for use of a dangerous weapon, even though just one weapon was used.

Third, private counsel provided ineffective assistance by failing to object to the State's admission of anecdotal statistical evidence. Probabilities cannot conclusively establish that a single event did or did not occur and are particularly inappropriate when used to establish facts not susceptible to quantitative analysis, such as whether a particular individual is telling the truth at any given time. Thus, even where statistically valid probability evidence has been presented, Utah courts have routinely excluded it because it invites the jury to focus upon a seemingly scientific, numerical conclusion

rather than to analyze the evidence before it and decide where truth lies. In this case, the State presented anecdotal statistical evidence that 90 percent of people who flee say they fled not because they were guilty of a particular crime, but because they had warrants. This evidence lacked foundation and encouraged the jury to reject Irvin's defense based on how other defendants acted, rather than on the evidence. Thus, the evidence was inadmissible under rule 403 and should have been objected to. Private counsel, however, did not object, thereby allowing the State to rob Irvin of the force of his defense by transforming his excuse for fleeing into a apparent example of his dishonest character.

ARGUMENT

I. THIS COURT SHOULD MERGE IRVIN'S AGGRAVATED ROBBERY CONVICTIONS BECAUSE THE TRIAL COURT ERRED BY DENYING IRVIN'S MOTION TO VACATE ONE OF THE AGGRAVATED ROBBERY COUNTS

The Double Jeopardy clauses of the United States and Utah constitutions prohibit the State from punishing a person twice for the same offense. U.S. Const. V; Utah Const. art. I, § 12; State v. Smith, 2003 UT App 179,¶11, 72 P.3d 692, cert. denied, 84 P.3d 239 (2003). As explained by the Utah Code, a "defendant may be prosecuted in a single criminal action for all separate offenses arising out of a single criminal episode; however, when the same act of a defendant under a single criminal episode shall establish offenses which may be punished in different ways under different provisions of this code, the act shall be punishable under only one such provision." Utah Code Ann. § 76-1-402(1) (2003). A "single criminal episode" encompasses "all conduct which is closely related in

time and is incident to an attempt or an accomplishment of a single criminal objective." Utah Code Ann. § 76-1-401 (2003).

Specifically, in Utah, a "single larcenous taking of property, whether owned by one or several individuals, will be treated as a single criminal offense." State v. Barker, 624 P.2d 694, 695 (Utah 1981). "This conclusion is based on the premise that if the taking . . . constitutes but a single act, then there is but one offense and the multiple ownership of the property taken is immaterial." Id. Its purpose "is to prevent the aggregation of criminal penalties for a single act and stems from the presupposition of our law to resolve doubts in the enforcement of the penal code against the imposition of a harsher punishment." Id. at 696 (citing Bell v. United States, 349 U.S. 81, 83 (1955); Sweek v. People, 277 P. 1 (Colo. 1929) ("This is a humane rule. . . . If each article stolen were of a value sufficient to make the crime a felony, and a separate charge could be filed as to each, a defendant, if convicted, might be sentenced to the penitentiary for the rest of his life.")).

For example, in State v. Kimbel, 620 P.2d 515 (Utah 1980), the defendant was charged with one count of theft, a third degree felony, based on two acts of theft committed over the course of a day. Kimbel, 620 P.2d at 515. On appeal, the defendant argued he should have been charged with two counts of misdemeanor theft rather than one count of felony theft. Id. at 517-18. Our supreme court held the "fact that the taking took place at different times is not dispositive" of whether the defendant should be charged with one count or two. Instead, the "crucial consideration" is the "intent of the thief." Id. at 518.

> "[T]he general test as to whether there are separate offenses or one offense is whether the evidence discloses one general intent or discloses separate and distinct intents. The particular facts and circumstances of each case determine this question. If there is but one intention, one general impulse, and one plan, even though there is a series of transactions, there is but one offense."

Kimbel, 620 P.2d at 518 (citation omitted) (alteration in original). Thus, because the "trial court and jury necessarily concluded that the thefts were part of a continuing plan," our supreme court affirmed the single count of felony theft despite "the fact that the actual takings occurred at different times on the same day." Id.

Similarly, in State v. Crosby, 927 P.2d 638 (Utah 1996), the defendant was charged with three counts of theft stemming from separate acts of misappropriation over a period of months. Crosby, 927 P.2d at 639. On appeal, the defendant argued his attorney offered ineffective assistance of counsel "by not timely objecting to the information in which Crosby was charged with three counts of theft instead of one count." Id. at 645. Reversing, our supreme court held that although there was "a series of transactions" utilizing "different methods to divert the cash" over a "period of time," there was "but one offense" because the defendant operated under "one general intent." Id. at 645-46; see also State v. Casias, 772 P.2d 975 (Utah Ct. App. 1989) (reversing where defendant was convicted of two counts of theft after he broke into a home and stole property and a gun, because defendant should only have been convicted of one count); State v. Bair, 671 P.2d 203 (Utah 1983) (reversing where defendant was charged with multiple counts of retaining stolen property after he received property stolen from

different victims at different times all at once, because defendant should only have been convicted of one count).

In this case, the two aggravated robbery charges stemmed from a single criminal episode. The conduct charged was closely related in time. The money and car keys were stolen within moments of each other and the entire encounter lasted less than twenty minutes. R. 366:110, 131. It was also "incident to the accomplishment of a single criminal objective, namely to [rob the convenience store] and avoid being caught." State v. Lopez, 789 P.2d 39, 42 (Utah Ct. App. 1990). Accordingly, Irvin could only be prosecuted once for each act within the single criminal episode. Utah Code Ann. § 76-1-402(1) (2003).

The Utah Code classifies aggravated robbery as a crime against property. See Utah Code Ann. §§ 76-6-301 & -302. It is a larcenous act distinguished from theft by its additional requirements that the property be taken from a person or the person's immediate presence by means of force or fear. Compare Utah Code Ann. §§ 76-6-404 (2003) and 76-6-301 & -302. As such, aggravated robbery is subject to Utah's "single larcenous taking" rule. Barker, 624 P.2d at 695. As in Kimbel, where our supreme court held two acts of theft committed over the course of a day constituted just one offense, and in Crosby, where our supreme court held multiple acts of misappropriation using different methods over a period of months constituted just one offense, this Court should hold Irvin's two counts of aggravated robbery should have merged into one count.

The State alleged Irvin, using a knife, robbed a convenience store clerk of the money in her cash register and her car keys. The evidence showed the robbery happened

all at once—it was a single act conducted with a single intent. Thus, it does not matter whether the items stolen were "owned by one or several individuals." Barker, 624 P.2d at 695. Under the single larcenous taking rule, there was "one offense and the multiple ownership of the property taken is immaterial." Id.

If, on the other hand, this Court chooses to look at aggravated robbery as a crime against the person, the result is the same. When dealing with "crimes against the person (as contrasted with crimes against property), a single criminal act or episode may constitute as many offenses as there are victims." State v. James, 631 P.2d 854, 855 (Utah 1981). "A defendant who commits an act of violence with intent to harm more than one person or by a means likely to cause harm to several persons is more culpable than a defendant who harms only one person." Id.

For example, in James, the defendant was charged with five counts of kidnapping after he held five customers hostage following an armed robbery. James, 631 P.2d at 855. On appeal, our supreme court upheld the five counts because the "five kidnappings constituted separate offenses arising out of a single criminal episode." Id.; see also State v. Gambrell, 814 P.2d 1136, 1140-41 (Utah Ct. App. 1991) (holding defendant could be charged with three counts of negligent homicide where "several persons were killed in one automobile accident); State v. Mane, 783 P.2d 61, 63-64 (Utah Ct. App. 1989) (holding defendant could be convicted of murder and two counts of aggravated assault even though various "shootings were part of a single criminal episode").

In this case, there were ultimately two victims of a larcenous act (which does not matter under the single larcenous act rule), but there was only one victim of an act of

violence. Celis was the only person approached in the convenience store and she was the only person against whom force or fear was used. Thus, because there was only one victim of violence, there was only one offense. In other words, regardless of whether this Court defines aggravated robbery as a crime against property or a crime against a person, the result is the same—there was just one aggravated robbery. Thus, this Court should reverse because the trial court erred by denying Irvin's motion to vacate one of the aggravated robbery charges.

II. THIS COURT SHOULD REVERSE BECAUSE DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE BY FAILING TO OBJECT TO THE ENHANCEMENT OF THE AGGRAVATED ROBBERY CHARGES, AND BY FAILING TO OBJECT TO THE ANECDOTAL STATISTICAL EVIDENCE PRESENTED AT TRIAL

The Sixth Amendment to the United States Constitution guarantees a defendant the right to "effective assistance of counsel." State v. Templin, 805 P.2d 182, 186 (Utah 1990). "The United States Supreme Court, in Strickland v. Washington, 466 U.S. 668 (1984), set forth the analytical framework for deciding ineffective assistance of counsel claims." State v. Tennyson, 850 P.2d 461, 465 (Utah Ct. App. 1993) (citation omitted). "'The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.'" Id. (citation omitted). To determine whether counsel provided effective assistance, Utah courts rely on the test established in Strickland. See State v. Montoya, 2004 UT 5,¶23, 84 P.3d 1183.

> To prevail on an ineffective assistance of counsel claim under the Strickland test, "a defendant must show (1) that counsel's

> performance was so deficient as to fall below an objective standard of reasonableness and (2) that but for counsel's deficient performance there is a reasonable probability that the outcome of the trial would have been different" . . . . [I]n making this evaluation, the court must "indulge in the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is[,] the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy."

Id. (second alteration in original) (citations omitted).

In this case, defense counsel provided ineffective assistance when he failed to object to the trial court's decision to enhance each of Irvin's aggravated robbery charges, and when he failed to object to the State's use of anecdotal statistical evidence.

A. Counsel Provided Ineffective Assistance When He Failed to Object to the Trial Court's Decision to Enhance the Aggravated Robbery Charges.

As explained below, private counsel's performance fell below an objective standard of reasonableness when he failed to object to the trial court's decision to enhance each of Irvin's aggravated robbery charges. Moreover, this Court should reverse because there was a reasonable probability that the outcome of the trial would have been different but for private counsel's deficient performance.

1. Private Counsel's Performance Was So Deficient As to Fall Below an Objective Standard of Reasonableness.

"To prevail on the first prong of the [Strickland] test, a defendant 'must identify specific acts or omissions demonstrating that counsel's representation failed to meet an objective standard of reasonableness.'" Montoya, 2004 UT 5 at ¶24 (citation omitted). Appellate courts "will not second-guess trial counsel's legitimate strategic choices,

however flawed those choices might appear in retrospect." Tennyson, 850 P.2d at 465 (citing Strickland, 466 U.S. at 689). "A defendant must therefore overcome the strong presumptions that counsel's performance fell 'within the wide range of reasonable professional assistance' and that 'under the circumstances, the challenged action "might be considered sound trial strategy."'" Id. (citations omitted). "Indeed," this Court has said "an ineffective assistance claim succeeds only when no conceivable legitimate tactic or strategy can be surmised from counsel's actions." Id. at 468 (citations omitted).

It is deficient performance if counsel fails to raise an argument because he "merely overlook[s]" it. State v. Moritzsky, 771 P.2d 688, 692 (Utah Ct. App. 1989). In Moritzsky, defendant argued his counsel was ineffective for providing a defense of habitation instruction that did not include "the statutory presumption" of reasonableness. Moritzsky, 771 P.2d at 692. On appeal, this Court reversed because there was "no tactical explanation for requesting a defense of habitation instruction without inclusion of the beneficial presumption." Id. Rather, it appeared "counsel merely overlooked the statutory presumption by failing to check the 'pocket-part' of the Utah Code." Id.; compare State v. Mahi, 2005 UT App 494,¶¶19, 21, 125 P.3d 103 (holding counsel not ineffective for not accepting curative instruction because it was "plausible, and even likely," that counsel had legitimate strategy to "not respond to the judge's offer to instruct the jury about the incarceration evidence because he did not want to draw further attention to the testimony"); State v. Bryant, 965 P.2d 539, 543 (Utah Ct. App. 1998) (holding counsel not ineffective for failing to compel alibi attendance, even though

record "silent" as to counsel's "subjective intent," because there were "rational bases" for counsel's conduct).

This holds true even if the issue counsel overlooked "was an open question in our courts." State v. Ison, 2006 UT 26,¶32, 135 P.3d 864. In Ison, defendant was charged with communications fraud, stemming from his "alleged misdeeds" that "frustrate[ed] the vacation plans of would-be" cruise passengers. Id. at ¶1. At trial, defendant's counsel made no attempt to admit a report previously made by an administrative law judge (ALJ) that found defendant "'made no misrepresentations to any passenger' and never 'assumed responsibility for the cruise and tour bookings in question.'" Id. at ¶9. Both this Court and our supreme court held the defendant received ineffective assistance because neither court was "persuaded" that defendant's counsel could "be excused for not seeking to introduce the ALJ's finding" simply because the issue of whether the ALJ report was admissible "was an open question in our courts." Id. at ¶32; see State v. Ison, 2004 UT App 252,¶16, 96 P.3d 374.

"[T]here was no strategic reason not to seek admission of the ALJ's findings." Ison, 2006 UT 26 at ¶32. Defendant "would have alerted his counsel that the ALJ had exonerated him." Id. "Indeed, is it possible that [defendant] did not have feelings of indignation upon learning that he was facing criminal charges based on the same alleged misrepresentations that the ALJ had found he did not make?" Id. "The ALJ's findings were potentially very powerful exculpatory evidence." Id. "Surely, competent counsel would scour the exceptions to the hearsay rule in search of a means to place the findings in the hands of the jury." Id. Thus, despite the fact that the admissibility of the ALJ

report was "an open question in our courts," both this Court and our supreme court held defendant "was afforded ineffective assistance of counsel based on [counsel's] failure to offer into evidence the ALJ's findings." Id. at ¶34; see Ison, 2004 UT App at ¶16.

The Double Jeopardy clauses of the United States and Utah constitutions prohibit the government from punishing a person twice for the same offense. U.S. Const. V; Utah Const. art. I, § 12; Smith, 2003 UT App 179 at ¶11. Under the Utah Code, a person who "unlawfully and intentionally takes or attempts to take personal property in the possession of another from his person, or immediate presence, against his will, by means of force or fear, and with a purpose or intent to deprive the person permanently or temporarily of the personal property," is guilty of robbery, a second degree felony. Utah Code Ann. § 76-6-301(1), (3) (Supp. 2005). If the person "uses or threatens to use a dangerous weapon" in the course of committing the robbery, however, then the Utah Legislature says he is guilty of a greater offense—aggravated robbery, a first degree felony. Utah Code Annotated § 76-6-302(1), (2).

Separately, the Utah Legislature has enacted a dangerous weapon enhancement statute:

> (2) If the trier of fact finds beyond a reasonable doubt that a dangerous weapon was used in commission or furtherance of a felony, the court:
> (a)(i) shall increase by one year the minimum term of the sentence applicable by law; and
> . . .
> (b) may increase by five years the maximum sentence applicable by law in the case of a felony of the second or third degree.

Utah Code Ann. § 76-3-203.8 (Supp. 2005).

Prior to 1995, the dangerous weapon enhancement statute "singl[ed] out firearms," rather than "encompass[ing] all 'dangerous weapons.'" State v. Montiel, 2005 UT 48,¶2 n.2, 122 P.2d 571 (citation omitted) (emphasis in original). Case law addressing the pre-1995 firearms enhancement statute "support[ed] the proposition that a defendant charged with a crime for which use of a dangerous weapon is an element may still be subject to an enhanced penalty when that weapon is a firearm." Id. (citing State v. Speer, 750 P.2d 186, 192 (Utah 1988); State v. Angus, 581 P.2d 992, 995 (Utah 1978); State v. Webb, 790 P.2d 65, 85-87 (Utah Ct. App. 1990)). Neither this Court nor our supreme court has addressed the issue of whether "the penalty for aggravated robbery may still be enhanced for use of a dangerous weapon even though use of a dangerous weapon is an element of the substantive offense." Id.

In this case, private counsel provided deficient performance when he failed to object to the trial court's decision to enhance both of Irvin's aggravated robbery charges in violation of the double jeopardy clauses of the United States and Utah constitutions. It is clear from the record that private counsel did not forego an objection to the enhancements for any strategic reason. R. 369:10-11. Rather, he simply had not "looked at" the issue and, rather than requesting time to research it, simply stated that he did not "believe there's any reason not to impose [the enhancements] at this point." Id. This lack of preparation gave credence to Irvin's pretrial motion to discharge private counsel because private counsel was not prepared to try his case. R. 366:6-9.

Moreover, private counsel was not excused from challenging the enhancements simply because the issue is an open question in our courts. See Ison, 2006 UT 26 at ¶32.

Less than one year before the sentencing proceedings in Irvin's case, our supreme court explained the possible double jeopardy implications of applying the dangerous weapon enhancement statute to an aggravated robbery charge and invited defense attorneys to raise the issue. See Montiel, 2005 UT 48 at ¶2 n.2. Because imposing the enhancements in Irvin's case violated the double jeopardy clauses of both the United States and Utah constitutions, private counsel provided deficient performance by making no effort to prevent their imposition.

a. Imposing the Dangerous Weapon Enhancements on Irvin's Aggravated Robbery Charges Violated the Double Jeopardy Clause of the United States Constitution.

The United States Supreme Court has interpreted the federal Double Jeopardy Clause "'to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense.'" Missouri v. Hunter, 459 U.S. 359, 365 (1983) (citation omitted). "With respect to cumulative sentences imposed in a single trial," the Double Jeopardy Clause prevents "the sentencing court from prescribing greater punishment than the legislature intended." Id. at 366. The "rule of statutory construction" applied when deciding what the legislature intended is the assumption "'that Congress ordinarily, does not intend to punish the same offense under two different statutes. Accordingly, where two statutory provisions proscribe the "same offense," they are construed not to authorize cumulative punishments in the absence of a clear indication of contrary legislative intent.'" Id. (citations omitted) (emphases in original). If, however, the legislature makes "its intent crystal clear," then "a court's task of

statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial." Id. at 368-69.

In this case, it was error to impose the dangerous weapon enhancements in addition to the sentences for aggravated robbery because it is not clear the Utah Legislature intended to impose cumulative punishments for the use of a dangerous weapon during an aggravated robbery.

The Utah Legislature has made its general intent concerning cumulative punishments clear: "A defendant may be prosecuted in a single criminal action for all separate offenses arising out of a single criminal episode; however, when the same act of a defendant under a single criminal episode shall establish offenses which may be punished in different ways under different provisions of this code, the act shall be punishable under only one such provision." Utah Code Ann. § 76-1-402(1). Similarly, a "defendant may be convicted of an offense included in the offense charged but may not be convicted of both the offense charged and the included offense. An offense is so included when . . . [i]t is established by proof of the same or less than all the facts required to establish the commission of the offense charged." Utah Code Ann. § 76-1-402(3)(a). The "motivating principle behind" the Utah Legislature's enactment of this merger doctrine was "to prevent violations of constitutional double jeopardy protection." State v. Smith, 2005 UT 57,¶7, 122 P.3d 615 (citations omitted).

"'[E]nhancement statutes are different in nature than other criminal statutes' because they single out particular characteristics of criminal conduct as warranting harsher punishment." Smith, 2005 UT 57 at ¶10 (citation omitted). "[W]here the

legislature intended a statute to be an enhancement statute, the merger doctrine set forth in section 76-1-402[] does not apply." Smith, 2005 UT 57 at ¶9 (citation omitted). If the legislature "intends to preclude section 76-1-402[] from requiring merger in a specific instance," however, "it must clearly indicate that the provision in question is intended to enhance the penalty for one type of offense when certain characteristics are present that independently constitute a different offense." Smith, 2005 UT 57 at ¶11. "Only when such an explicit indication of legislative intent is present in the specific offense statute will we consider it appropriate to exempt that statute from operation of the general merger requirements in section 76-1-402[]." Id.

"An example of such an express indication appears in Utah Code section 76-6-202, which first defines the crime of burglary as unlawfully entering or remaining in a building with the intent to commit certain listed offenses, Utah Code Ann. § 76-6-202(1)(a)-(g) (2003), and then specifies that a violation of the burglary statute is a 'separate offense' from any of those offenses so listed, id. § 76-6-202(3)." Smith, 2005 UT 57 at ¶11 n.3. "This language makes clear that the burglary statute imposes an enhanced penalty on those who would otherwise be considered guilty of the lesser crime of criminal trespass, . . . where that crime is committed in conjunction with an intent to commit one of the listed offenses." Id.

Neither the aggravated robbery statute nor the dangerous weapon enhancement statute contain the necessary "explicit indication" of the legislature's intent to cumulatively punish a defendant's use of a dangerous weapon during a robbery. If a person commits robbery without a dangerous weapon then he is guilty of a second degree

felony. Utah Code Ann. § 76-6-301(3). If a person uses a dangerous weapon during a robbery, then he is guilty of the greater offense of aggravated robbery, a first degree felony. Utah Code Ann. § 76-6-302(2). Similar to the aggravated robbery statute, the dangerous weapon enhancement statute enhances the punishment of a defendant for use of a "dangerous weapon . . . in the commission or furtherance of a felony." Utah Code Ann. § 76-3-203.8(2). The legislature did not include any language in the dangerous weapon enhancement statute to indicate that it was explicitly overriding the plain language of section 76-1-402 and making the dangerous weapon enhancement a mechanism to doubly punish use of a dangerous weapon. Id.

Before the 1995 amendment of the dangerous weapon enhancement statute, the legislature made clear its intent to doubly punish use of a firearm by expressly limiting the application of the enhancement statute to firearms, rather than all dangerous weapons. See Utah Code Ann. § 76-3-203 (1994) (firearms enhancement statute); Montiel, 2005 UT 48 at ¶2 n.2 (citing Speer, 750 P.2d at 192; Angus, 581 P.2d at 995; Webb, 790 P.2d at 85-87). Such a limitation made crystal clear the legislature's determination that "the use of firearms" is "innately more dangerous" than the use of other dangerous weapons and is "therefore more deserving of punishment." Angus, 581 P.2d at 995. If the legislature wanted to make its intent to doubly punish use of all dangerous weapons during a robbery when it amended the enhancement statute in 1995 to apply to all dangerous weapons, then it had to again make its intent crystal clear. The legislature chose not to enact any language making clear its intent to doubly punish use of a dangerous weapon during the commission of a robbery. Utah Code Ann. § 76-3-

203.8(2). Absent "such an explicit indication of legislative intent," this Court should look to "the general merger requirements in section 76-1-402[]" and hold the dangerous weapon enhancement merges into aggravated robbery when the aggravating factor charged was use or threatened use of a dangerous weapon. Smith, 2005 UT 57 at ¶11.

b. Imposing the Dangerous Weapons Enhancements on Irvin's Aggravated Robbery Charges Violated the Double Jeopardy Clause of the Utah Constitution.

"[T]he double jeopardy guarantees afforded defendants under the Utah Constitution are different from and provide greater protection than those afforded by the United States Constitution." State v. Harris, 2004 UT 103,¶23, 104 P.3d 1250 (citing State v. Trafny, 799 P.2d 704, 709-10 & n.18 (Utah 1990) (observing that the federal double jeopardy protection is "instructive," but nevertheless conducting a separate analysis pursuant to the Utah Constitution); State v. Ambrose, 598 P.2d 354, 358-60 (Utah 1979) (articulating and applying a distinct double jeopardy standard under the Utah Constitution that was formulated before the federal double jeopardy clause was made applicable to the states)).

This Court should interpret Utah's double jeopardy clause different than the federal double jeopardy clause and hold it "cannot reasonably be interpreted to leave legislatures completely free to subject a defendant to the risk of multiple punishment on the basis of a single criminal transaction." Hunter, 459 U.S. at 373 (Marshall, J., dissenting). This Court has looked to Montana previously when interpreting Utah's double jeopardy clause, and should look to Montana again in this case. Taylorsville City v. Adkins, 2006 UT App 374,¶13 n.2, 145 P.3d 1161.

The Montana Constitution guarantees "[n]o person shall be again put in jeopardy for the same offense previously tried in any jurisdiction." Mont. Const. art. II, § 25. In State v. Guillaume, 975 P.2d 312 (Mt. 1999), the Supreme Court of Montana faced the issue of whether "it is a violation of double jeopardy" to "apply the weapon enhancement statute" when "use of a weapon is an element of the underlying offense." Guillaume, 975 P.2d at 315. Criticizing the United States Supreme Court's reasoning that the federal double jeopardy clause hinges on clear legislative intent, the Montana Supreme Court interpreted its own constitution to prohibit applying a weapon enhancement statute when use of a weapon is an element of the underlying offense. Id. at 316.

The Montana Supreme Court held its constitution "provides greater protection from double jeopardy than is provided by the United States Constitution." Guillaume, 975 P.2d at 315. The Montana Constitution "'vests in the courts the exclusive power to construe and interpret legislative Acts, as well as provisions of the Constitution. Inherent in this power is the responsibility to determine whether a particular law conforms to the Constitution.'" Id. at 316 (citation omitted). Moreover, "[c]onstitutional guarantees are not mere vessels to be left empty or filled at the whim of the legislative branch. Rather, they have intrinsic meaning which is independent of any legislative intent." Id. (citation omitted). Thus, "pursuant to [its] duty to safeguard the rights and guarantees provided by" its state constitution, "and notwithstanding legislative intent," the Montana Supreme Court held "the application of the weapon enhancement statute to felony convictions where the underlying offense requires proof of use of a weapon violates the double jeopardy provision . . . of the Montana Constitution." Guillaume, 975 P.2d at 316.

In reaching its decision, the Montana Supreme Court was "guided by the fundamental principle embodied in double jeopardy. Simply put, double jeopardy exemplifies the legal and moral concept that no person should suffer twice for a single act." Id. at 316. "The only factor raising [defendant's] charge from misdemeanor assault to felony assault was his use of a weapon." Id. at 317. The Montana Supreme Court "interpret[ed] this distinction between the two offenses, and the different penalties imposed by each offense, as the legislature's way of punishing a criminal defendant for use of a weapon in committing an assault." Id. "Thus, when the weapon enhancement statute was applied to [defendant's] felony assault conviction, [defendant] was subjected to double punishment for use of a weapon: once when the charge was elevated from misdemeanor assault to felony assault, and again when the weapon enhancement statute was applied." Id. Reversing, the Montana Supreme Court held "this form of double punishment is exactly what double jeopardy was intended to prohibit." Id.

Following the reasoning of the Montana Supreme Court, this Court should interpret Utah's Double Jeopardy Clause to prohibit convicting Irvin of aggravated robbery based on his alleged use of a firearm during a robbery and then enhancing Irvin's conviction based on his use of a firearm. Utah's double jeopardy provision, like Montana's, provides people greater protections than those provided by the United States Constitution. See Harris, 2004 UT 103 at ¶23; Trafny, 799 P.2d at 709-10 & n.18; Ambrose, 598 P.2d at 358-60. The Framers of the Utah Constitution did not intend the Constitution to be a blank slate on which the legislature could impose its will. See Utah Const. art. V, § 1 ("The powers of the government of the State of Utah shall be divided

into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others."); State v. Merrill, 2005 UT 34,¶27, 114 P.3d 585 (holding "the separation of powers provision found in article V, section 1 of the Utah Constitution imposes a limit on legislative power"). Rather, the Framers intended the Constitution to be a set of guidelines defining the boundaries in which the legislature could act. See id. If Utah's provision against being twice put in jeopardy for the same offense "is to have any real meaning," the Utah Legislature "cannot be allowed to convict a defendant two, three, or more times simply by enacting separate statutory provisions defining nominally distinct crimes." Hunter, 459 U.S. at 370-71 (Marshall, J., dissenting).

Thus, the trial court's imposition of the dangerous weapon enhancements in addition to Irvin's two aggravated robbery convictions violated Utah's double jeopardy clause. Accordingly, this Court should reverse because trial counsel provided ineffective assistance of counsel when he failed to object to the trial court's imposition of the dangerous weapon enhancements.

c. Imposing the Dangerous Weapon Enhancement Twice, Once for Each Aggravated Robbery Charge, Violated the Double Jeopardy Clauses of the United States and Utah Constitutions.

As explained above, the Double Jeopardy clauses of the United States and Utah constitutions prohibit the State from punishing a person twice for the same offense. U.S. Const. V; Utah Const. art. I, § 12; Smith, 2003 UT App 179 at ¶11. In keeping with these guarantees, the Utah Code says a "defendant may be prosecuted in a single criminal

action for all separate offenses arising out of a single criminal episode; however, when the same act of a defendant under a single criminal episode shall establish offenses which may be punished in different ways under different provisions of this code, the act shall be punishable under only one such provision." Utah Code Ann. § 76-1-402(1) (2003). A "single criminal episode" encompasses "all conduct which is closely related in time and is incident to an attempt or an accomplishment of a single criminal objective." Utah Code Ann. § 76-1-401 (2003).

When dealing with "crimes against the person (as contrasted with crimes against property), a single criminal act or episode may constitute as many offenses as there are victims." James, 631 P.2d at 855. "A defendant who commits an act of violence with intent to harm more than one person or by a means likely to cause harm to several persons is more culpable than a defendant who harms only one person." Id. In this case, Irvin was charged with threatening one person with one knife one time. R. 2-4; 366-67. That Irvin was charged with taking two items does not change this fact. See supra at Part I. As discussed in section I, Irvin's action constituted one offense. See id. If the dangerous weapon enhancement was applicable at all, it should only have been applied once. See id. Thus, it was error to apply the dangerous weapon enhancement twice in Irvin's case, once for each aggravated robbery charge.

2. This Court Should Reverse Because But For Private Counsel's Deficient Performance, There Is a Reasonable Likelihood the Outcome of the Case Would Have Been Different.

To satisfy the second prong of the Strickland test, a defendant must show that "but for counsel's deficient performance there is a reasonable probability that the outcome of

the trial would have been different." Montoya, 2004 UT 5 at ¶23 (citations omitted). In this case, there is a reasonable probability the result of the trial would have been different but for private counsel's failure to object to the trial court's decision to impose the dangerous weapon enhancement to each of the aggravated robbery charges.

The ultimate result of trial counsel's deficient performance was to ensure Irvin was punished multiple times for his single use of a dangerous weapon. First, the single robbery was split into two robberies—each upgraded to first-degree-felony aggravated robbery for the use of a dangerous weapon. See supra at Part I. As discussed in Section I, private counsel argued against this error below, thereby properly preserving it for appeal. See id. Second, each aggravated robbery was enhanced again for use of a dangerous weapon. See R. 315-16; 369. Private counsel made no effort to prevent the enhancement of the aggravated robbery charges, not for some strategic reason, but because he had simply overlooked the issue. R. 369:10-11. Had private counsel adequately prepared for sentencing by preparing to argue against the imposition of the dangerous weapon enhancements, then counsel could have ensured Irvin's aggravated robbery charges would not have been subject to the dangerous weapon enhancement statute, thereby eliminating one or two of the three additional punishments improperly imposed for Irvin's alleged use of a dangerous weapon. Id.

B. Private Counsel Provided Ineffective Assistance By Failing to Object to the State's Admission of Anecdotal Statistical Evidence.

First, as explained above, in order to "prevail on the first prong of the [Strickland] test, a defendant 'must identify specific acts or omissions demonstrating that counsel's

representation failed to meet an objective standard of reasonableness.'" Montoya, 2004 UT 5 at ¶24 (citation omitted). In this case, private counsel performed deficiently when he failed to object to the State's admission of anecdotal statistical evidence.

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Utah R. Evid. 403. A "trial court may find evidence to be unfairly prejudicial, and therefore inadmissible, if it appeals to the jury's sympathies, arouses a sense of horror, provokes the instinct to punish, or otherwise may cause the jury to based its decision on something other than the established propositions of the case." State v. Lindgren, 910 P.2d 1268, 1272 (Utah Ct. App. 1996) (citations and quotations omitted).

For example, in State v. Rammel, 721 P.2d 498 (Utah 1986), a witness "initially denied any involvement" in the crime but "later admitted that he had been the driver." Rammel, 721 P.2d at 499. At trial, a detective testified, based on his "experience interviewing several hundred criminal suspects," "that he did not consider it unusual for [the witness] to lie to him when . . . first interrogated" because "most suspects lie when initially questioned by police." Id. at 500. On appeal, our supreme court determined the trial court erred in admitting the detective's testimony. Id. at 500-01. "[T]he prosecution attempted to establish, in effect, that there was a high statistical probability that [the witness] lied." Id. at 501. "Even where statistically valid probability evidence has been presented—and [the detective's] testimony hardly qualifies as such—courts have routinely excluded it when the evidence invites the jury to focus upon a seemingly scientific, numerical conclusion rather than to analyze the evidence before it and decide

where truth lies." Id. at 501 (citation omitted). "Probabilities cannot conclusively establish that a single event did or did not occur and are particularly inappropriate when used to establish facts 'not susceptible to quantitative analysis,' such as whether a particular individual is telling the truth at any given time." Id. (citations omitted).

Similarly, in State v. Iorg, 801 P.2d 938 (Utah Ct. App. 1990), the victim delayed reporting sexual abuse for "two and a half years." Iorg, 801 P.2d at 939. At trial, a deputy testified that "fifty percent of the thirty victims she had interviewed delayed reporting for over a year," and said it was her opinion that delay did not indicate fabrication. Id. On appeal, this Court held the trial court erred by admitting the deputy's testimony because the Utah Supreme Court has "continued to condemn anecdotal 'statistical' evidence concerning matters not susceptible to quantitative analysis such as witness veracity." Id. at 941.

In this case, Irvin claimed he fled from police not because he was guilty of the robbery, but because he knew he had an outstanding warrant. R. 366:92; 367:36-37. To discredit this claim, the State presented anecdotal statistical evidence that 90 percent of people who flee say they fled not because they were guilty of a particular crime, but because they had warrants. R. 366:155. The foundation for this evidence was utterly lacking. Id. "There was no showing that the anecdotal data from which [Officer Anderson] drew his conclusions had any statistical validity. Nor was there any evidence to establish that [his] experience uniquely qualified him as an expert . . . to give such testimony." Rammel, 721 P.2d at 501. In fact, the testimony was even less reliable than the testimony presented in Rammel because it was based on information gathered from a

"dozen, give or take" foot chases, R. 366:155, rather than from the interviews of "several hundred criminal suspects." Rammel, 721 P.2d at 500.

Moreover, the evidence "invited the jury to draw inferences about" the credibility of Irvin's defense based not on the evidence, but on Officer Anderson's "past experience with other suspects." Rammel, 721 P.2d at 500. In fact, the only purpose of the testimony was "to establish, in effect, that there was a high statistical probability that" Irvin's defense was a fabrication. Id. at 501. As such, it fell squarely within the category of evidence that "courts have routinely excluded" under rule 403 because it "invites the jury to focus upon a seemingly scientific, numerical conclusion rather than to analyze the evidence before it and decide where truth lies." Id. (citation omitted).

The record reveals no strategic reason for allowing the State to admit the anecdotal statistical testimony without qualifying Officer Anderson as an expert, providing any foundation, or demonstrating how the probative value of the evidence could possibly outweigh its prejudicial effect. R. 366:155. In fact, private counsel allowed the evidence to come in without ever even trying to find out whether it was "true or not." R. 367:36. Thus, private counsel provided deficient performance by allowing the anecdotal statistical evidence to be admitted without objection, even though it was inadmissible under rule 403.

Second, as explained above, in order to satisfy the second prong of the Strickland test, a defendant must show that "but for counsel's deficient performance there is a reasonable probability that the outcome of the trial would have been different." Montoya, 2004 UT 5 at ¶23 (citations omitted). In this case, there is a reasonable

probability the outcome of the trial would have been different if private counsel had objected to the State's inadmissible anecdotal statistical evidence.

In Iorg, this Court held the State's introduction of anecdotal statistical evidence "clearly calculated to bolster" the victim's credibility was prejudicial error because the "case hinged on credibility." Iorg, 801 P.2d at 941-42. "Since this case depended on the jury's assessment of the victim's credibility versus the defendant's, and there is not 'other evidence [to support] the defendant's conviction,' beyond that which is tainted by [the] improper testimony," this Court could not say "that absent the error there [was] not a reasonable likelihood of a more favorable result to the defendant." Id. at 942 (citations omitted).

Similarly, in this case, there was no eyewitness identification linking Irvin to the robbery. R. 366-67. The State's proof of identification relied entirely on circumstantial evidence gathered from Irvin's physical appearance at the traffic stop. Id. Irvin's defense against this circumstantial evidence was to show it was the product of happenstance, not guilt. R. 366:92; 367:36-37. In order to prove his defense, Irvin took the enormous gamble of introducing evidence of his outstanding warrant. R. 366:158; see State v. Shickles, 760 P.2d 291, 295 (Utah 1988) (noting prior bad acts evidence "tends to skew or corrupt the accuracy of the fact-finding process" and leads the finder of fact to convict on "an improper basis"); Utah R. Evid. 404(b). Because he knew he had an outstanding warrant, he had a reason to flee from the police other than guilt. R. 366:92; 367:36-37. But the State robbed Irvin of the force of his gamble by introducing foundationless anecdotal statistical evidence to suggest Irvin must have been lying about

the reason he fled because a "dozen more or less" other people had told such lies. R. 366:155; 367:35. Absent this baseless attack, there was a reasonable probability that the jury would have viewed the circumstantial evidence relied on by the State as the result of unhappy happenstance rather than guilt. Id. Thus, this Court should reverse because there was a reasonable probability of a different outcome but for private counsel's deficient performance in failing to object to the State's anecdotal statistical evidence.

III. THIS COURT SHOULD REVERSE BECAUSE THE TRIAL COURT'S IMPOSITION OF THE DANGEROUS WEAPONS ENHANCMENTS RESULTED IN AN ILLEGAL SENTENCE

Rule 22 of the Utah Rules of Criminal Procedure says a "court may correct an illegal sentence, or a sentence imposed in an illegal manner, at any time." Utah R. Crim. P. 22(e). This rule allows an appellate court to "'review the legality of a sentence'" even if "the issue was not raised in the trial court." State v. Finlayson, 2000 UT 10,¶¶7-8, 994 P.2d 1243; see State v. Brooks, 908 P.2d 856, 860 (Utah 1995). As explained above, the trial court's decision to present to the jury two aggravated robbery charges, rather than one, and then to impose dangerous weapon enhancements on both charges violated the double jeopardy clauses of the United States and Utah constitutions. See supra at Parts I & II. This error resulted in Irvin receiving two terms of six years to life, rather than one term of five years to life. See id. Because the trial court's error resulted in an unconstitutional sentence, this Court should correct the sentence pursuant to rule 22(e).

CONCLUSION

Irvin respectfully requests this Court to reverse and remand his case to the trial

court for a new trial on a single charge of aggravated robbery, with an order to refrain from enhancing the aggravated robbery charge if Irvin's new trial results in a conviction.

SUBMITTED this 11 day of December, 2006.

Lori Seppi

LORI J. SEPPI
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, LORI J. SEPPI, hereby certify that I have caused to be hand-delivered the original and seven copies of the foregoing to the Utah Court of Appeals, 450 South State, 5th Floor, P.O. Box 140230, Salt Lake City, Utah 84114-0230, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 11 day of December, 2006.

Lori Seppi
LORI J. SEPPI

DELIVERED to the Utah Court of Appeals and the Utah Attorney General's Office as indicated above this ____ day of December, 2006.

Tab A

UBP

3RD DISTRICT COURT - SALT LAKE COURT
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff,	:	MINUTES SENTENCE, JUDGMENT, COMMITMENT
vs.	:	Case No: 051904377 FS
ROY DRAKE JR IRVIN, Defendant.	:	Judge: TIMOTHY R. HANSON Date: June 9, 2006

289613

PRESENT
Clerk: evelynt
Reporter: AMBROSE, EILEEN
Prosecutor: ORTEGA, CRISTINA P
Defendant
Defendant's Attorney(s): BODILY, NYAL C

DEFENDANT INFORMATION
Date of birth: September 18, 1969
Video
Tape Number: 6/9/06 Tape Count: 11:36

CHARGES

1. AGGRAVATED ROBBERY - 1st Degree Felony
   Plea: Guilty - Disposition: 03/29/2006 Guilty
2. AGGRAVATED ROBBERY - 1st Degree Felony
   Plea: Guilty - Disposition: 03/29/2006 Guilty
3. FAIL TO STOP/RESPOND AT COMMAND OF POLIC - 3rd Degree Felony
   Plea: Guilty - Disposition: 03/29/2006 Guilty

SENTENCE PRISON

Based on the defendant's conviction of AGGRAVATED ROBBERY a 1st Degree Felony, the defendant is sentenced to an indeterminate term of not less than six years and which may be life in the Utah State Prison.

Based on the defendant's conviction of AGGRAVATED ROBBERY a 1st Degree Felony, the defendant is sentenced to an indeterminate term of not less than six years and which may be life in the Utah State Prison.

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Based on the defendant's conviction of FAIL TO STOP/RESPOND AT COMMAND OF POLIC a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

COMMITMENT is to begin immediately.

To the SALT LAKE County Sheriff: The defendant is remanded to your custody for transportation to the Utah State Prison where the defendant will be confined.

SENTENCE PRISON CONCURRENT/CONSECUTIVE NOTE

The 2 First Degree felonies are to run concurrent and consecutively with count #3. Credit granted defendant for 362 days served.

SENTENCE RECOMMENDATION NOTE

Restitution ordered to Fast Track in amount of $1105.00, and Victim Marie Celis $212.

SENTENCE FINE

Charge # 1	Fine:	$1500.00
	Suspended:	$0.00
	Surcharge:	$1300.00
	Due:	$2800.00
Charge # 2	Fine:	$1500.00
	Suspended:	$0.00
	Surcharge:	$1300.00
	Due:	$2800.00
Charge # 3	Fine:	$750
	Suspended:	$0.00
	Surcharge:	$631.55
	Due:	$1381.55

Case No: 051904377
Date: Jun 09, 2006

Total Fine:	$3750.00
Total Suspended:	$0
Total Surcharge:	$3231.55
Total Principal Due:	$6981.55
	Plus Interest

Pay fine to The Court.

Dated this 9 day of June, 2006

TIMOTHY R. HANSON
District Court Judge

STATE OF UTAH
THIRD DISTRICT COURT
SALT LAKE COUNTY

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Tab B

U.S. CONSTITUTION

AMENDMENT V

[Criminal actions — Provisions concerning — Due process of law and just compensation clauses.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Utah Constitution Article I, Section 12 - Rights of Accused Persons

Article I, Section 12. [Rights of accused persons.]

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

Where the defendant is otherwise entitled to a preliminary examination, the function of that examination is limited to determining whether probable cause exists unless otherwise provided by statute. Nothing in this constitution shall preclude the use of reliable hearsay evidence as defined by statute or rule in whole or in part at any preliminary examination to determine probable cause or at any pretrial proceeding with respect to release of the defendant if appropriate discovery is allowed as defined by statute or rule.

UTAH CODE ANN. § 76-1-401 (2003)

76-1-401. "Single criminal episode" defined — Joinder of offenses and defendants.

In this part unless the context requires a different definition, "single criminal episode" means all conduct which is closely related in time and is incident to an attempt or an accomplishment of a single criminal objective.

Nothing in this part shall be construed to limit or modify the effect of Section 77-8a-1 in controlling the joinder of offenses and defendants in criminal proceedings.

UTAH CODE ANN. § 76-1-402 (2003)

76-1-402. Separate offenses arising out of single criminal episode — Included offenses.

(1) A defendant may be prosecuted in a single criminal action for all separate offenses arising out of a single criminal episode; however, when the same act of a defendant under a single criminal episode shall establish offenses which may be punished in different ways under different provisions of this code, the act shall be punishable under only one such provision; an acquittal or conviction and sentence under any such provision bars a prosecution under any other such provision.

(2) Whenever conduct may establish separate offenses under a single criminal episode, unless the court otherwise orders to promote justice, a defendant shall not be subject to separate trials for multiple offenses when:

(a) The offenses are within the jurisdiction of a single court; and

(b) The offenses are known to the prosecuting attorney at the time the defendant is arraigned on the first information or indictment.

(3) A defendant may be convicted of an offense included in the offense charged but may not be convicted of both the offer se charged and the included offense. An offense is so included when:

(a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or

(b) It constitutes an attempt, solicitation, conspiracy, or form of preparation to commit the offense charged or an offense otherwise included therein; or

(c) It is specifically designated by a statute as a lesser included offense.

---

(4) The court shall not be obligated to charge the jury with respect to an included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense.

(5) If the district court on motion after verdict or judgment, or an appellate court on appeal or certiorari, shall determine that there is insufficient evidence to support a conviction for the offense charged but that there is sufficient evidence to support a conviction for an included offense and the trier of fact necessarily found every fact required for conviction of that included offense, the verdict or judgment of conviction may be set aside or reversed and a judgment of conviction entered for the included offense, without necessity of a new trial, if such relief is sought by the defendant.

UTAH CODE ANN. § 76-3-301 (Supp. 2005)

76-6-301. Robbery.

(1) A person commits robbery if:

(a) the person unlawfully and intentionally takes or attempts to take personal property in the possession of another from his person, or immediate presence, against his will, by means of force or fear, and with a purpose or intent to deprive the person permanently or temporarily of the personal property; or

(b) the person intentionally or knowingly uses force or fear of immediate force against another in the course of committing a theft or wrongful appropriation.

(2) An act is considered to be "in the course of committing a theft or wrongful appropriation" if it occurs:

(a) in the course of an attempt to commit theft or wrongful appropriation;

(b) in the commission of theft or wrongful appropriation; or

(c) in the immediate flight after the attempt or commission.

(3) Robbery is a felony of the second degree.

UTAH CODE ANN. § 76-3-302 (2003)

76-6-302. Aggravated robbery.

(1) A person commits aggravated robbery if in the course of committing robbery, he:

(a) uses or threatens to use a dangerous weapon as defined in Section 76-1-601;

(b) causes serious bodily injury upon another; or

(c) takes or attempts to take an operable motor vehicle.

(2) Aggravated robbery is a first degree felony.

(3) For the purposes of this part, an act shall be considered to be "in the course of committing a robbery" if it occurs in an attempt to commit, during the commission of, or in the immediate flight after the attempt or commission of a robbery.

UTAH CODE ANN. § 76-3-203.8 (Supp. 2005)

76-3-203.8. Increase of sentence if dangerous weapon used.

(1) As used in this section, "dangerous weapon" has the same definition as in Section 76-1-601.

(2) If the trier of fact finds beyond a reasonable doubt that a dangerous weapon was used in the commission or furtherance of a felony, the court:

(a) (i) shall increase by one year the minimum term of the sentence applicable by law; and

(ii) if the minimum term applicable by law is zero, shall set the minimum term as one year; and

(b) may increase by five years the maximum sentence applicable by law in the case of a felony of the second or third degree.

(3) A defendant who is a party to a felony offense shall be sentenced to the increases in punishment provided in Subsection (2) if the trier of fact finds beyond a reasonable doubt that:

(a) a dangerous weapon was used in the commission or furtherance of the felony; and

(b) the defendant knew that the dangerous weapon was present.

(4) If the trier of fact finds beyond a reasonable doubt that a person has been sentenced to a term of imprisonment for a felony in which a dangerous weapon was used in the commission of or furtherance of the felony and that person is subsequently convicted of another felony in which a dangerous weapon was used in the commission of or furtherance of the felony, the court shall, in addition to any other sentence imposed including those in Subsection (2), impose an indeterminate prison term to be not less than five nor more than ten years to run consecutively and not concurrently.

Utah R. Evid. 403

Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Tab C

INSTRUCTION NO. 19

Under the law of the State of Utah, robbery is the unlawful and intentional taking of personal property in the possession of another from his person, or immediate presence, against his will, accomplished by means of force or fear. A person commits aggravated robbery if in the course of committing robbery, that person uses or threatens to use a dangerous weapon; or causes serious bodily injury upon another.

INSTRUCTION NO. 20

Before you can convict the defendant, Roy Drake Irvin , of the offense of Aggravated Robbery as charged in count I of the information, you must find from all of the evidence and beyond a reasonable doubt each and every one of the following elements of that offense:

1. That on or about the 3rd day of July, 2005, in Salt Lake County, State of Utah, the defendant, Roy Drake Irvin , took personal property then in the possession of Fast Track Convenience Store , from the person or immediate presence of Fast Track Convenience Store ; and

2. That such taking was unlawful;

3. That such taking was intentional;

4. That such taking was against the will of Fast Track Convenience Store;

5. That such taking was accomplished by means of force or fear; and

6. That in the course of committing such taking, a dangerous weapon was used.

If, after careful consideration of all of the evidence in this case, you are convinced of the truth of each and every one of the foregoing elements beyond a reasonable doubt, then you must find the defendant guilty of Aggravated Robbery as charged in count I of the information. If, on the other hand, you are not convinced beyond a reasonable doubt of any one or more of the foregoing elements, then you must find the defendant not guilty of count I.

INSTRUCTION NO. 21

Before you can convict the defendant, Roy Drake Irvin , of the offense of Aggravated Robbery as charged in count II of the information, you must find from all of the evidence and beyond a reasonable doubt each and every one of the following elements of that offense:

1. That on or about the 3rd day of July, 2005, in Salt Lake County, State of Utah, the defendant, Roy Drake Irvin , took personal property then in the possession of **Teresa Celis**, from the person or immediate presence of Teresa Celis; and

2. That such taking was unlawful;

3. That such taking was intentional;

4. That such taking was against the will of Teresa Celis ;

5. That such taking was accomplished by means of force or fear; and

6. That in the course of committing such taking, a dangerous weapon was used.

If, after careful consideration of all of the evidence in this case, you are convinced of the truth of each and every one of the foregoing elements beyond a reasonable doubt, then you must find the defendant guilty of Aggravated Robbery as charged in count II of the information ~~and you need not consider any alternative offense~~. If, on the other hand, you are not convinced beyond a reasonable doubt of any one or more of the foregoing elements, then you must find the defendant not guilty of count II, Aggravated Robbery. ~~You may then consider the guilt of the defendant with respect to the alternate Count II, Theft of an Operable Motor Vehicle, as charged in the information.~~

Tab D

solely on the nature of what's taken.

And then the other point I want to make has to do with the robbery statute itself. The robbery statute requires "taking from the person or immediate presence of the person by force or fear." There was no force or fear used to take the money -- or to take the money from the person that that money belonged to. And I don't know the gentleman's name, the store owner, nothing was taken from him by force or fear. That would be, as far as he is concerned, merely a theft. If money that belonged to him was taken from him and the person had the intent to permanently deprive him of it, there was a theft from that person.

The only robbery that occurred was from the clerk. The money that was in her care and the car that was hers and that was one robbery. A continuing course of conduct, continuing fear where multiple things were taken, that's a single robbery. It's not a robbery of the person who owned the money. If anything, it's a theft.

THE COURT: Okay. Thank you. Well, a very interesting question. I don't think the decision has to turn on whether you have one or two victims, or whether you have a victim who owns the money but wasn't there, or the property was taken from the person who had the responsibility of the money, an employee like in this case. I don't think the decision should turn on that.

Whether there were two separate crimes that are charged separately even though they may be in a single criminal episode -- and I look at a single criminal episode is just a procedural matter. Single criminal episode you try them all at once, if you can't you try them separately. But it seems to me the better rationale has to be here that certainly a robbery has to occur, and it can only occur when the property is taken from a person.

In this case we have a -- we have a robbery, and Mr. Irvin came into the store and he took the property that was owned by the store owner -- who wasn't there, but under the care, custody or control of his employee who was there -- by force or fear. I agree with the State at that point in time, that crime ends as far as the robbery is concerned. If something had have happened in the back room besides just taking her keys, then everybody agrees it would be another crime. But at that point in time, after the force and fear are necessary to get the cash out of the cash register is concluded, he takes her in the back room, the force and fear continues and she gives up the keys to her car.

Now, granted it's the same person from whom the property was taken. If it wasn't, the second charge wouldn't be a robbery it would be something else. But her property was taken from her against her will by force or fear and that is her automobile. And I think that constitutes a separate crime.

And the reason I do say that is in the circumstances of this case, and each case turns on its own, factually anyway, but it just seems to me once the initial crime is completed, the robbery -- taking the money by force and fear -- is completed and then there's a second type of property taken from -- in this case, this is her personal property, this isn't her property that's being taken that she has charge of as an employee -- and through force and fear, you've got a second crime.

So accordingly I deny the defense motion. It's an interesting question and perhaps it ought to be visited in the appellate courts and they'll certainly tell me if it is or not. I have no question about that. So in any event I'm going to deny the motion. When I sentence on this matter I'll be sentencing on two robberies.

I'll ask the State to prepare an order. And please, in the order set forth what I've said here as to why I think State's position is correct so when the appellate court takes a look at it if they choose to they can see the order without any question and see why I did what I did. And if I'm wrong, then I'm wrong.

MR. FISHER: Yes, your Honor.

THE COURT: Thank you, gentleman. I'll see you pretty soon. Sentencing is on the 9th of June? Yes. Okay. I'll see you then.

Tab E

DAVID E. YOCOM
District Attorney for Salt Lake County
T. LANGDON FISHER, 5694
Deputy District Attorney
231 East 400 South, Suite 300
Salt Lake City, Utah 84111
Telephone: (801) 363-7900

IN THE THIRD DISTRICT COURT, SALT LAKE DEPARTMENT

IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH

THE STATE OF UTAH, Plaintiff, -vs- ROY DRAKE IRVIN, JR., Defendant.	**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** Case No. 051904377FS Hon. Timothy R. Hansen

This Court presided over trial in the above-entitled matter on March 28–29, 2006. At the conclusion of that trial, the jury returned guilty verdicts on all counts, including two counts of Aggravated Robbery. Defendant subsequently filed a Motion to Vacate Conviction for Aggravated Robbery, which came before this Court for hearing on May 11, 2006. Present at said hearing were the defendant, his attorney, Nyal C. Bodily, and Deputy District Attorney T. Langdon Fisher. Prior to the hearing, the Court had received the defendant's motion and accompanying memorandum, and the State's response thereto. Oral arguments by both parties were presented in open court. Based on the evidence presented at trial and on the parties' memoranda and arguments, the Court enters the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. The defendant entered the Fastback Convenience Store in Salt Lake County ("the store" and held a knife against the store clerk, C.S. ("the victim"), to induce her to open the store cash register. The defendant then took money from the register that was under the victim's care and control, but which belonged to the store owner.
2. Still in possession of the knife, the defendant then told the victim to give him her car keys. He then took her to the back of the store, talked about tying her up, and told her to stay in the back of the store when he left. These actions—taking the victim's car keys, removing her to the back of the store, talking about tying her up, and telling her to stay put—were committed to facilitate taking the victim's personal vehicle. The defendant left the building and drove away in the victim's personal vehicle.

CONCLUSIONS OF LAW

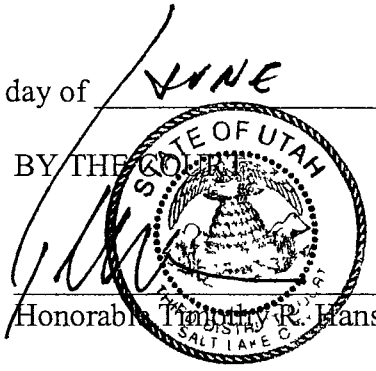
1. Taking the money from the store cash register completed the first, separate offense of Aggravated Robbery.
2. The defendant began a second, separate offense of Aggravated Robbery when he took the victim's personal car keys, removed her to the back of the store, talked about tying her up, and told her to stay there. When he then took the victim's motor vehicle, the defendant completed the second, separate offense of Aggravated Robbery.

ORDER

Based on the findings of fact and conclusions of law as outlined above, the defendant's Motion to Vacate Conviction for Aggravated Robbery is denied.

DATED this 9 day of JUNE, 2006

BY THE COURT:



Honorable Timothy R. Hansen

READ AND APPROVED AS TO FORM:

Nyal C. Bodily
Attorney for the Defendant

Tab F

THE COURT: HOW DO WE KNOW THAT?

MS. ORTEGA: THAT'S THE INFORMATION MR. FISHER LEFT IN THE FILE. I CAN GET PROOF OF THAT TO THE COURT, BUT HE INDICATED THAT 1,105.00 WAS STOLEN FROM THE CONVENIENCE STORE AND 212.50 WAS FOR THE VICTIM'S LOST WAGES. THAT'S WHAT HE WROTE IN HIS NOTES.

THE COURT: FASTRAC'S GOT $1105.00 COMING. DO YOU AGREE WITH THAT?

MS. ORTEGA: WHAT WAS THAT?

THE COURT: 1105.00?

MS. ORTEGA: WAS STOLEN, CORRECT.

THE COURT: OKAY. AND THEN 212.50 TO MS. CELIS?

MS. ORTEGA: CORRECT.

THE COURT: OKAY. IS THERE ANY LEGAL REASON I SHOULD NOT IMPOSE SENTENCE AT THIS TIME?

MR. BODILY: NO, YOUR HONOR.

THE COURT: I GUESS, I'LL GIVE YOU AN OPPORTUNITY TO BE HEARD ON WHETHER OR NOT THE YEAR ENHANCEMENT APPLIES TO THIS SENTENCE, WHICH WOULD MAKE THIS SIX TO LIFE AS OPPOSED TO FIVE TO LIFE. IS THERE ANY REASON THAT SHOULDN'T APPLY PURSUANT TO 76-3-203 SUB(8)?

MR. BODILY: YOUR HONOR, I HAVEN'T LOOKED AT THAT. CAN I TAKE A MINUTE TO LOOK AT THAT?

THE COURT: LOOK AT IT IN DUE COURSE. BUT I'M GOING TO IMPOSE IT. IF, FOR SOME REASON, I NEED TO CHANGE IT I'LL

RECONSIDER IT.

MR. BODILY: I DON'T BELIEVE THERE'S ANY REASON NOT TO IMPOSE IT AT THIS POINT.

THE COURT: I'M SORRY?

MR. BODILY: I DON'T KNOW OF ANY REASON NOT TO IMPOSE IT AT THIS POINT.

THE COURT: MR. IRVIN, HAVING BEEN CONVICTED BY A JURY OF TWO COUNTS OF AGGRAVATED ROBBERY, 1ST DEGREE FELONIES, INVOLVING THE USE OF A DANGEROUS WEAPON, SPECIFICALLY A KNIFE, ON EACH COUNT IT IS THE JUDGMENT OF THIS COURT THAT YOU BE INCARCERATED IN THE UTAH STATE PRISON FOR THE TERM PRESCRIBED BY LAW FOR THOSE TWO CONVICTIONS OF AGGRAVATED ROBBERY.

AND BECAUSE YOU USED A DANGEROUS WEAPON, THEY ARE, EACH IS ENHANCED ONE YEAR ON THE BOTTOM, WHICH MAKES IT A SIX TO LIFE SENTENCE ON EACH COUNT. AND THAT'S THE ORDER OF THIS COURT.

I ALSO IMPOSE A $1500.00 FINE ON EACH COUNT.

AND I ALSO ORDER RESTITUTION TO THERESA CELIS IN THE AMOUNT OF $212.50. AND RESTITUTION TO FASTRAC, THE CONVENIENCE STORE, WHOSE MONEY WAS TAKEN, IN THE AMOUNT OF $1,105.00.

APPARENTLY THERE IS NO RESTITUTION OWING ON MS. CELIS' CAR THAT YOU TOOK THAT DAY.

HAVING PLED GUILTY TO -- OR NOT HAVING PLED GUILTY, HAVING BEEN FOUND GUILTY BY A JURY OF FAILURE TO STOP AT AN OFFICER'S SIGNAL OR COMMAND, A 3RD DEGREE FELONY, IT IS

Tab G

A. No.

Q. Okay. You said you've been an officer for ten years. Have you ever been -- you were in a foot chase this night, have you ever been in any other foot chases?

A. Yes.

Q. And it's a long career. Can you put a number, an approximate number of the number of foot chases you have been involved in?

A. Um, maybe a dozen, give or take.

Q. Okay. And how often did you catch your man?

A. I think I've only had one get away from me.

Q. Did you have a chance to talk to the people you caught?

A. Every one.

Q. And do you ever ask them why they ran?

A. Typically, they say because they thought they had warrants.

Q. What you do you mean by typically, what percentage of the time do you get that answer?

A. Probably 90 percent of the time if you ask, "Why did you run?" They will say, "Because I have warrants."

MR. VO-DUC: That's all I have for now, Your Honor.

THE COURT: Cross-examination, Mr. Bodily?

MR. BODILY: Thank you, Your Honor.

***